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Re: *The Ravenswood Investment Company, L.P. v. Winmill & Co. Incorporated*
C.A. No. 7048-VCN
Date Submitted: October 11, 2012

Dear Counsel:

Sometimes disputes that arise during the course of litigation can be resolved by resort to grand principles. Sometimes a practical approach offers a better option for moving the matter along. The current disagreement seems to fall in the latter category.

Plaintiff The Ravenswood Investment Company, LP ("Ravenswood") is not in its first dispute with Defendant Winmill & Co., Incorporated ("Winmill"),[1] and it now sponsors a two-pronged complaint addressing Winmill's reluctance or abject failure (depending on one's frame of reference) to share corporate information with its minority shareholders. At the core of its litigation efforts lies Ravenswood's belief that Winmill's board withholds information with the expectation that Winmill's share price will fall because of investor reluctance to acquire shares in a company that refuses to disclose important corporate information.

Ravenswood combines in its Complaint a traditional action to inspect Winmill's books and records under 8 *Del. C.* § 220 and a fiduciary duty claim which, in substance, alleges that Winmill's board persistently fails to release corporate information with the anticipation that this pattern of conduct will drive down Winmill's stock price and allow Winmill's insiders to acquire its stock through option programs that carry an unreasonably low price.

[1] *E.g.*, *The Ravenswood Inv. Co., L.P. v. Winmill*, 2011 WL 2176478 (Del. Ch. May 31, 2011).

Winmill has asserted, as an affirmative defense to Ravenswood's demands under Section 220, that Ravenswood lacks a proper purpose for making a demand to inspect its books and records. The reasons, linked to Winmill's status as a company with no federal requirements for regular reporting to its shareholders are framed as follows: "[Ravenswood's] refusal to agree to any confidentiality agreement here makes it plain that, if it is successful in obtaining non-public financial information of Winmill, it will use that information to trade with persons who do not possess that information."[2]

Before the Court is a motion filed by Winmill.[3] First, it objects to Ravenswood comingling of a Section 220 action with a fiduciary duty action. Second, it seeks dismissal of the fiduciary duty claim, essentially because Delaware law does not impose reporting or disclosure requirements on a corporation's board of directors except when seeking shareholder approval.

[2] Defs.' Am. Answer and Mot. to Dismiss the Am. Verified Compl. under 8 *Del. C.* § 220 and Class Action and Deriv. Compl. for Breach of Fiduciary Duty, Third Affirmative Defense, at 16.
[3] The individual defendants, who are all of Winmill's directors, also join in the motion.

Ravenswood also has filed a motion to compel. It wants to depose board members in support of its Section 220 action—essentially to test the substance of Winmill's claim of concern about what Ravenswood might do if it receives non-public corporate financial information. Winmill has offered to produce John Ramirez, its Assistant General Counsel, to testify on these issues. Ravenswood, instead, wants to depose two of Winmill's directors. Alternatively, if it cannot take the depositions of the two directors, it seeks an order precluding their testimony at trial.

By bringing a Section 220 action and claim for breach of fiduciary duty simultaneously in the same complaint, Ravenswood has, perhaps unintentionally, but predictably, altered the pacing of a Section 220 proceeding. Books and records actions are supposed to proceed summarily. The companion fiduciary duty claims would slow the pace. The Section 220 and fiduciary duty claim should not have been brought together.[4] Dismissal of the fiduciary duty claims would be one way to break the deadlock. The simpler, and in this case, the more pragmatic way, is to separate the Section 220 aspect from the fiduciary duty aspect. Reaching the

[4] *See, e.g.*, *TravelCenters of Am., LLC v. Brog*, 2008 WL 868107, *1 (Del. Ch. May 31, 2008).

broader question of whether fiduciary duty claims should be brought in the same proceeding as Section 220 claims need not be reached in this instance. It is perhaps worth noting that, unlike most cases, the Section 220 aspect and the fiduciary duty aspect do overlap and relate to the rights of minority shareholders to receive corporate information. The Court holds the view that moving forward with the books and records aspect of this matter will clarify the issues and should be done on a schedule closer to that of a traditional Section 220 proceeding. Thus, the Court will separate the two claims; resolve the Section 220 aspect; and then, address the fiduciary duty claim, if it remains. Thus, the Court will defer, for the time being, a ruling on the sufficiency, as a matter of pleading, of Ravenswood's fiduciary duty claim.

As for the Section 220 portion of this proceeding, the Court notes that the discovery obligation typically confronted by the corporate defendant is relatively minimal; indeed, it has been described as "narrow in purpose and scope."[5] Certainly, discovery into the reasons why an opportunity to inspect Winmill's books and records would be premised upon a confidentiality commitment or a

[5] *U.S. Die Casting and Dev. Co. v. Sec. First Corp.*, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995).

commitment not to trade in Winmill's stock is an appropriate topic for discovery. The discovery taken, as a general matter, by a plaintiff in a Section 220 action is of the corporation; it is the corporation that has any duty under Section 220 and not, directly, its directors. Thus, at least for purposes of initial discovery, the corporate officer selected by Winmill should suffice. His production for deposition would appear to be under, or comparable to, appearance under Rule 30(b)(6). There is no reason to believe, at least for now, that the designee is not knowledgeable about the purposes behind the atypical condition on inspection. If it turns out that he is not aware of the reasons and purposes behind the requirement, additional discovery, *i.e.*, deposition of the directors, may become necessary. In addition, if Winmill persists in denying Ravenswood the opportunity to depose its directors, those directors will not be allowed to testify at trial on the Section 220 claims.[6]

The record does not reflect that Ravenswood has sought to take the deposition of Winmill's directors through use of the commission process. The directors are defendants in this action, but they are not defendants for purposes of

[6] Ravenswood's dispute regarding the sufficiency of Winmill's answers to its interrogatories is more a matter of undifferentiated dissatisfaction with the answers. To the extent that the interrogatories relate to the fiduciary duty claim, answers may wait until after resolution of the Section 220 aspect.

Section 220. If and when the case moves to the fiduciary duty aspects, it is anticipated, especially in light of the small number of directors, that they will be available for deposition.

Accordingly, the Section 220 aspect of this action will be severed from the fiduciary duty claims presented by Plaintiff. Ravenswood will take the deposition of Mr. Ramirez. It may renew its application if there is cause for doing so. A ruling on the Defendants' motion to dismiss the fiduciary duty claim will be deferred pending resolution of the Section 220 aspect of these integrally-related claims.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K